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**DISTRICT I**

December 20, 2022

To:

Hon. David A. Hansher  
Circuit Court Judge  
Electronic Notice

George Christenson  
Clerk of Circuit Court  
Milwaukee County Safety Building  
Electronic Notice

Christopher P. August  
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John D. Flynn  
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Frank P. Howard 42874  
Oakhill Correctional Institution  
P.O. Box 938  
Oregon, WI 53575-0938

You are hereby notified that the Court has entered the following opinion and order:

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2020AP1885-CRNM      State of Wisconsin v. Frank P. Howard (L.C. # 2017CF5181)

Before Brash, C.J., Dugan and White, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Frank P. Howard appeals a judgment convicting him after a jury trial of one count of unlawfully possessing a firearm after being convicted of a felony. Attorney Mitchell Barrock filed a no-merit report seeking to withdraw as appellate counsel.<sup>1</sup> *See* WIS. STAT. RULE 809.32 (2019-20);<sup>2</sup> *Anders v. California*, 386 U.S. 738, 744 (1967). Howard filed several responses to

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<sup>1</sup> Attorney Barrock withdrew in July 2021 and was replaced by Attorney Christopher P. August. Attorney August informed the court that he would proceed with the no-merit report as filed.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

the report. After considering the no-merit report and the responses, and after conducting an independent review of the record as mandated by *Anders*, we conclude that there are no issues of arguable merit that Howard could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The complaint alleged that Howard crashed into a tree while driving his truck and Howard told the police that someone had shot at him, causing him to crash. The complaint further alleged that Howard showed signs of intoxication, that he was wearing a gun holster, and that a gun was found on the ground near Howard's truck. Howard was charged with unlawfully possessing a firearm after being convicted of a felony. After a jury trial, he was convicted of the charge. The circuit court sentenced Howard to three years of initial confinement and four years of extended supervision.

The no-merit report addresses whether there was sufficient evidence adduced at trial to support Howard's conviction. When reviewing the sufficiency of the evidence, we look at whether "the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Zimmerman*, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn [the] verdict." *Id.* (citation omitted).

At trial, Howard admitted he was driving his car when he crashed into a tree after leaving a tavern. Responding police officers testified that Howard had slurred speech, red eyes, balance issues, and trouble standing, and that Howard was wearing a gun holster. The State introduced

testimony and other evidence establishing that a gun was found on the ground near where Howard was standing. Howard told the police that he had a gun in a video that was played for the jury. The State introduced evidence showing that Howard had a previous felony conviction that made it unlawful for him to possess a firearm. Based on our review of the trial transcript and other evidence, as partially summarized here, we conclude that there was sufficient evidence presented at the trial for the jury to find Howard guilty of unlawful possession of a firearm as a convicted felon. There would be no arguable merit to a claim that there was insufficient evidence presented at trial to support the verdict.

The no-merit report and Howard's response both address whether Howard is entitled to a new trial based on ineffective assistance of trial counsel because trial counsel failed to bring a motion to suppress Howard's statements before trial. To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Even if Howard's counsel filed a motion to suppress before trial, it would not have been successful. Howard was interviewed by police forty-eight hours after he was arrested. Video recordings of his interview with police show that he was read his *Miranda*<sup>3</sup> rights and was not under the influence of any intoxicants. He joked with the officers and admitted that he had a gun in the truck. Moreover, during trial Howard testified and admitted to the jury that he had a gun in the truck. Counsel did not render ineffective assistance by failing to raise an issue that is

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<sup>3</sup> See *Miranda v. Arizona*, 385 U.S. 925 (1965).

meritless. *See State v. Golden*, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994). There would be no arguable merit to this claim.<sup>4</sup>

In his response, Howard contends that the police should have investigated whether someone tried to kill him by shooting at his truck, causing him to crash. Howard's argument in this regard is not grounds for appellate relief in this appeal because Howard's claim that someone tried to kill him has no bearing on whether he unlawfully possessed a firearm.

Howard next argues in his response that his slurred speech and trouble standing could have been the result of a concussion, rather than intoxication, and he should have been taken to the hospital. Howard has not appealed a conviction for operating while intoxicated. Howard's arguments about his intoxication, or lack thereof, have no bearing on Howard's conviction for unlawful possession of a firearm. There would be no arguable merit to raising them on appeal.

Howard next argues in his response that he did not have a prior felony conviction that prevented him from carrying a firearm because he served only forty-five days in jail when he was previously convicted of a felony. Trial exhibit #8 establishes that Howard was convicted of a previous felony. The nature of the conviction is determinative, not the length of time Howard spent in jail. This argument would have no arguable merit.

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<sup>4</sup> Appointed appellate counsel states in the no-merit report that trial counsel brought a general motion in limine before trial, but should have brought a more specific motion to suppress before trial. The no-merit report asserts that counsel's actions were negligent, "but such negligence was not substantial." We disagree that counsel's actions were negligent. First, we see no basis for a motion to suppress in the record, the no-merit report, or the responses. Moreover, the no-merit report refers to an incorrect legal standard. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that to establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance).

The no-merit report addresses whether there are any other potential issues that Howard could raise on appeal regarding jury selection, opening statements, trial objections, and sentencing. We agree with the report's analysis and conclusion that there are not any such issues. Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney August of further representation of Howard.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christopher P. August is relieved of any further representation of Howard in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*